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The Admissibility of Testimony Concernng Transactions with Decedents

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THE ADMISSIBILITY OF TESTIMONY CONCERNING TRANSACTIONS WITH DECEDENTS

It is the purpose of this article to provide a means of ready reference to all of the Washington cases, up to and including the 133rd Washington, which have construed, applied or discussed the statute of this state which excludes testimony in certain cases by interested parties as to transactions with persons since deceased.

The statutes upon this subject vary more or less widely in the different states, and no other state has a statute closely resembling ours. *O'Connor v. Slatter,* 46 Wash. 308, 89 Pac. 885; *Northern Bank & Trust Co. v. Harmon,* 126 Wash. 25, 27; 217 Pac. 8. Hence the decisions of courts of other states upon this subject are of questionable weight, and the decisions of our own Supreme Court construing this statute assume an increased importance.

The Washington statute upon this subject is as follows:

> "No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: *Provided, however,*[1] that *in an action or proceeding*[2] *where the adverse party*[3] *sues or defends as* executor, administrator,[4] or legal representative[5] of any deceased person, or as deriving right or title[6] by, through, or from and deceased person, or as the guardian or conservator of the estate of any insane person,[7] or of any minor under the age of fourteen years, *then a party in interest*[8] *or to the record shall not be admitted to testify*[9] *in his own behalf*[10] *as to any transaction*[11] *had by him with or any statement*[12] *made to him by* any such deceased or insane person, or by any such minor under the age of fourteen years: *Provided further,*[13] that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who

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1-See I., page 23.
2 See II., page 25.
3 See III., page 25.
4 See IV., page 26.
5 See V., page 27.
6 See VI., page 27.
7 See VII., page 28.
8 See VIII., page 28.
9 See IX., page 33.
10 See X.. page 33.
11 See XI., page 33.
12 See XII., page 41.
13 See XIII., page 42.

have no other or further interest in the action." Remington's Comp. Stat., sec. 1211; Pierce's Code, sec. 7722.

The statute has remained in its exact present form since it was last amended in 1890 by the addition of the clause "or as deriving right or title by, through, or from any deceased person." The following references to the statute will show its history and evolution: L. '54, p. 186, sec. 290; L. '60 p. 63, sec. 284; L. '63 p. 154, sec. 327; L. '67 p. 88, sec. 1; L. '69 p. 103, sec. 384;L. '73 p. 106, sec. 382; L. '77 p. 85, sec. 391; Code '81, sec. 389; L. '90 p. 91, sec. 1; Huntley Code, sec. 763; 2 Hill Code, sec. 1646; Code of '96 (McLaughlin), sec. 4214; Ballinger's Code, sec. 5991; Remington and Ballinger's Code, sec. 1211; Remington's Code (1915), sec. 1211; Rem. Comp. Stat., sec. 1211; Pierce's Code (1912), title 81, sec. 1027; Pierce's Code (1919, 1921, 1923), sec. 7722.

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I. What is General Purpose of the Statute and How Construed

The general principle of statutory construction is stated as follows in 36 Cyc. 1106, 1110, 1162.

> "The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. This intention, however, must be the intention as expressed in the statute. Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object, it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object.
>
> The proviso should be construed together with the enacting clause, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act. The enacting clause is, of course, the principal part of the statute, and as its terms may be presumed to have embodied the main object of the act, the proviso should be strictly construed."

What is the main object and intent of this statute? It will be noted that it is composed of three parts: (1) the enacting clause; (2) the proviso, and (3) the proviso to the proviso. Some of the cases have emphasized the theory that the main object of the statute is found in the enacting clause which is general in its language, and therefore that the proviso, which carves a special exception out of the enacting clause and renders evidence inadmissible which would otherwise be competent, is to be strictly construed, not extended beyond its language, and takes no case out of the enacting clause which does not fall clearly within the terms of the proviso. *Sackman v. Thomas,* 24 Wash. 660, 673, 64 Pac. 819; *In re Cunningham's Estate,* 94 Wash. 191, 193, 161 Pac. 1193.

Other cases have placed emphasis upon the proviso and stressed the theory that the main purpose of the statute is to exclude all testimony by interested parties relating to transactions with persons since deceased or statements made by them, and should be interpreted more or less liberally in order to carry out this general purpose and intent. For example, in *Nicholson v. Kilbury,* 80 Wash. 500, 141 Pac. 1043, the Court held that although the statute did not expressly exclude testimony as to statements made by the decedent to a third person in the presence of, but not to, the interested witness, nevertheless that such testimony is inadmissible "under the doctrine of necessary implication."

The general purpose of the statute is stated as follows in *Bay View Brewing Company v. Grubb,* 31 Wash. 34, 38-9, 71 Pac. 553:

> "The object of the statute clearly was that, where one of the parties to a transaction or contract is dead, the mouth of the other is closed concerning that transaction. . . . . By this statute parties are placed upon a footing of absolute equality. One may testify when the other may. But when one of the parties to the contract or transaction is dead, then the other cannot be heard to speak as to what was said or done at the time of the transaction. Hardship may result in particular cases, but generally justice will more fully prevail by reason of the rule."

And in *In re Cunningham's Estate,* 94 Wash. 191, 193, 161 Pac. 1193, it is said:

> "The evident purpose of this statute is to prevent those whom it covers from detailing any transaction with the deceased which it would be to the interests of the deceased if living to deny. This purpose has been expressed thus: death having closed the lips of one party, the law closes the lips of the other."

In *O'Connor v. Slatter,* 48 Wash. 493, 495, 93 Pac. 1078, Judge Rudkin, speaking for the Court, said:

> "Death has sealed the lips of one of the parties and the statute imposes the same silence upon the other. The prohibition of the statute is absolute and unconditional. It admits of no qualification or exception, and it is not the province of this Court to add to it or take from it."

One may not prove by indirection through his own testimony that which the statute will not permit him to testify directly. *Spencer v. Terrel,* 17 Wash. 514, 50 Pac. 468; *O'Connor v. Slatter,* 48 Wash. 493, 496, 93 Pac. 1078; *Goldsworthy v. Oliver,* 93 Wash.

67, 69, 160 Pac. 4; *Denis v. Metzenbaum,* 124 Wash. 86, 213 Pac. 453.

The statute relates to the remedy, states a mere rule of evidence, and does not affect or impair contractual rights or vested property rights, so that it is constitutional, even though changed or amended by the legislature after the commencement of the action. This statute as it exists *at the time of the trial,* rather than at the time of the commencement of the action, governs, and testimony within its terms is excluded by it even though admissible under the statute as it existed at the time of the transactions in question and at the time of the commencement of the action. *Smith v. Taylor,* 2 Wash. 422, 425, 27 Pac. 812; *Kenney Presbyterian Home v. Kenney,* 45 Wash. 106, 110, 88 Pac. 108.

II. Actions in Which the Rule Does Not Apply.

The bar of the statute does not apply in proceedings for the probate or contest of a will. *In re Anderson's Estate,* 114 Wash. 591, 594, 195 Pac. 994; *In re Zelinsky's Estate,* 130 Wash. 165, 166, 227 Pac. 507.

In *In re Alfstad's Estate,* 27 Wash. 175, 187, 67 Pac. 593, it was held in effect that the inhibition of the statute does apply as to testimony at the hearing on the final report of the administratrix.

III. The Adverse Party.

In an action against an administratrix, her testimony as to the transaction with the deceased is admissible, because she is both the witness and the administratrix, so that the same are not "adverse" to each other, but are the same individual. The statute applies and excludes the testimony only when the party who is adverse to the witness on the stand, or to the party calling him and for whom he is testifying, is suing or defending as executor, administrator or legal representative, etc. The statute does not disqualify an interested witness on behalf of the estate, but only one who is adverse to the estate. *O'Connor v. Slatter,* 46 Wash. 308, 89 Pac. 85; *In re Cunningham's Estate,* 94 Wash. 191, 161 Pac. 1193; *Brucker v. De Hart,* 106 Wash. 386, 391, 180 Pac. 397.

However, where the executor claims certain property in his individual capacity as grantee of the deceased in his lifetime, the executor is barred by the statute from testifying to the delivery of

the deed by the deceased to him, since he is claiming adversely to the state. *In re Miller's Estate,* 129 Wash. 211, 216, 224 Pac. 607.

IV. Executor, Administrator, Etc.

The inhibition of the statute applies only in cases where at the time of testifying the adverse party is suing or defending in one of the enumerated capacities. *Neis v. Farquharson,* 9 Wash. 508, 515, 37 Pac. 697.

In an action by a beneficiary on a certificate of membership in defendant mutual life insurance society after death of assured, defense being his false representations, the statute has no application, since the insurance society is not defending as executor, administrator or legal representative of the deceased assured, or as deriving right or title through him. *Erickson v. Modern Woodmen,* 43 Wash. 242, 244, 86 Pac. 584.

Likewise, in an action against the city to recover damages for a slide due to a regrade, plaintiff's testimony that a previous assignment by him of his right of action to one, since deceased, was not an absolute assignment but merely as collateral security, is admissible, as the statute has no application, since the defendant city was not an executor, administrator or legal representative of the deceased, nor one deriving right or title through him. *Marks v. Seattle,* 88 Wash. 61, 70, 152 Pac. 706.

In an action to recover attorneys' fees for services rendered for the deceased, defendants being the trustees of his estate, based upon their personal promise to pay the same, in consideration of the conveyance of certain property of the estate to them, the statutory proviso does not apply, since defendants were defending in their personal, rather than in their official capacity, and the fact that they derived title through the estate of the deceased "does not change the purpose and effect of the agreement here sued upon." *Hart v. Bogle,* 88 Wash. 125, 137, 152 Pac. 1010.

In an action against executors, testimony of plaintiffs as to agreements and arrangements between themselves and the deceased is inadmissible since it comes within the terms of the proviso, and the testimony was not admissible to establish a liability upon the part of another living defendant, since the relief sought against him was incidental to the principal object sought against the executors, especially since the court was not advised as to the restricted purpose for which it was offered. *Thorne v. Joy,* 15 Wash. 83, 86, 45 Pac. 642.

In an action by a wife, individually and as executrix of the will

of her deceased husband, to recover for personal injuries sustained by herself, the husband having died three months after the wife's injuries, his estate is sufficiently a party so that the statutory proviso applies where $150.00 damages to the community for medical attendance and employment of others for housework is sought, and to that extent the plaintiff is suing as executrix, although the gravamen of the demand is damages for continuing lifetime disabilities of the widow individually. *O'Toole v. Faulkner,* 34 Wash. 371, 375, 75 Pac. 975.

V. Legal Representative.

Where the plaintiff was *cestui que trust* of a resulting trust, the trustee having been her deceased son, and the court in a previous action had decreed the entire title to be in her, she is a legal representative of the deceased within the meaning of this statute. "Legal representative" as therein used does not mean "personal representative." *Smith v. Taylor,* 2 Wash. 422, 425, 27 Pac. 812.

A mutual life insurance society is not a legal representative of the deceased assured. *Erickson v. Modern Woodmen,* 43 Wash. 242, 244, 86 Pac. 584.

VI. Deriving Right or Title Through the Deceased.

It was also held in *Smith v. Taylor, supra* (See V.), that the case came within the statutory proviso because the plaintiff claimed title by, through, or from the deceased.

The statute applies as against the plaintiff in an action by the husband of the deceased to establish a resulting trust, the defendants being heirs and children of the deceased by a former marriage, who claim through her a one-half interest in the alleged community property. *Spencer v. Terrel,* 17 Wash. 514, 518, 50 Pac. 468.

Where the deceased husband by his will left all of the community property to his wife "confidently leaving it to her to make . . . . provision for founding" a home for aged persons, and thereafter the wife by will created a trust for the founding and maintenance of the plaintiff, the plaintiff in an action to quiet title sues as "deriving right or title by, through, or from" the deceased husband, so that the bar of the statute applies and excludes testimony by defendant that the land in question was purchased with partnership funds of himself and the deceased husband. *Kenney Presbyterian Home v. Kenney,* 45 Wash. 106, 110, 88 Pac. 108.

In an action to quiet title, defendants being a widower and his

children, where defendant and his wife before her death had executed and delivered a deed to plaintiff's grantor, but this deed was later lost and defendant made affidavit stating the facts as to execution and delivery, the statute does not apply, and this affidavit is admissible on behalf of the plaintiff, because the children do not derive right or title through their deceased mother, since the affidavit shows that she and her husband had conveyed all their title prior to her death. *Margett v. Wilson,* 85 Wash. 98, 103, 147 Pac. 628.

In an action against trustees of the estate of a decedent to recover for services rendered for the deceased, based on their personal promise to pay therefor in consideration of the conveyance of certain property of the estate to them, the statutory proviso does not apply, as the fact that they derived title through the estate of the deceased "does not change the purpose and effect of the agreement here sued upon." *Hart v. Bogle,* 88 Wash. 125, 137, 152 Pac. 1010.

Where plaintiff sues on an Ohio judgment on a promissory note as assignee of the administrator of the deceased payee, he sues as deriving right or title through the deceased payee, so that defendant may not testify as to an agreement between the payee and himself. *Cowen v. Culp,* 97 Wash. 480, 482, 166 Pac. 789.

VII. Guardian of Estate of Insane Person or Minor.

Cases in which one of the parties sued or defended as guardian of the estate of an insane person: *Chlopeck v. Chlopeck,* 47 Wash. 256, 258, 91 Pac. 966; *Sanborn v. Dentler,* 97 Wash. 149, 154, 166 Pac. 62; *Blaser v. Meeker,* 125 Wash. 379, 382, 216 Pac. 1.

Cases in which one of the parties sued or defended as guardian of a minor under fourteen: *Brown v. Davis,* 98 Wash. 442, 445, 167 Pac. 1095 (shown by briefs, although not by the decision); *Spotts v. Westlake Garage Co.,* 116 Wash. 255, 258, 199 Pac. 294.

VIII. Party in Interest.

It should be borne in mind that the statutory proviso applies and the testimony is rendered admissible, only where the witness on the stand is either a party in interest or a party to the record. It is unnecessary that he be both, however.

A. In General.

In an action by an administrator against a former administrator of the same estate to recover for the misappropriation of assets of

the estate, defendant's brother, a son and heir of the deceased, is not a party in interest, since the estate would not be diminished by a personal judgment against the defendant. Dictum that he would be a party in interest if the estate would be thus diminished. *McCoy v. Ayers,* 2 Wash. Terr. 307, 312.

In an action against executor of deceased payee to recover possession of a promissory note, plaintiff, the maker, is a party in interest. *Carr v. Jones,* 29 Wash. 78, 83, 69 Pac. 646.

In an action for personal injury sustained in a collision of a wagon with defendant's street car, defendant's motorman, who was not joined as a party defendant, is not a party in interest, since he cannot be bound by the result of the suit and would have an opportunity to prove lack of negligence on his part before his employer could obtain reimbursement from him in any subsequent action. The interest which disqualifies a witness is an interest in the event of the action, and the true test of interest is that the record will be legal evidence against the witness in another action, which would not be true as to this motorman.

> "If the interest is of a doubtful nature, the objection goes to the credibility of the witness and not to his competency."
>
> *O'Toole v. Faulkner,* 34 Wash. 371, 375, 75 Pac. 975.

For similar holding on similar facts, to the effect that defendant's conductor in charge of clearing a landslide, who was not made a party of record, is not a party in interest, see *Slavens v. Northern Pac. Ry. Co.* (C. C. A.), 97 Fed. 255, 261.

Court quotes with approval from Greenleaf:

> "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote, or contingent." *In re Sloan's Estate,* 50 Wash. 86, 90, 96 Pac. 684, 17 L. R. A. (N. S.) 960.

In an action to recover land, plaintiff's attorney is not a party in interest where he testified that he had made no arrangements with his client concerning his fees, that there was no agreement for a contingent fee or for any interest in the property recovered, and that he would charge a reasonable fee, although he would charge more if successful than if unsuccessful. Dictum that where, however, it is previously agreed that the attorney is to receive an interest in

whatever may be recovered or is to be compensated only in the event of success, the attorney is a party in interest.

> "The disqualifying interest must be a direct and immediate interest in the event of the action, and not an uncertain, remote and contingent interest. The relationship of the witness to the action must be such that he will either gain or lose by the direct legal operation and effect of the judgment." *Swingley v. Daniels,* 123 Wash. 409, 413, 212 Pac. 729.

It was held that the witness was not a party in interest or to the record in *Richardson v. Agnew,* 46 Wash. 117, 120, 89 Pac. 404, and *Plath v. Mullins,* 87 Wash. 403, 151 Pac. 811.

B. Joint Owner or Heir of Community Property or Separate Property.

In an action to recover for the benefit of the community, such as for the husband's personal services in the community business, his wife is a party in interest, since the amount recovered will be community property in which she is equally interested with the husband. *Whitney v. Priest,* 26 Wash. 48, 49, 66 Pac. 108.

Likewise in an action by a son of the deceased to enforce an alleged oral contract of the father to give plaintiff by will all his property in consideration of care and support, the plaintiff's wife is a party in interest whose testimony as to the contract is inadmissible, since the recovery would be community property because acquired during marriage by contract rather than by gift or devise. *Andrews v. Andrews,* 116 Wash. 513, 517, 199 Pac. 981.

However, in an action to recover plaintiff's *separate property,* plaintiff's son and heir apparent is not a party in interest, because his only interest is that of a prospective heir, the rule being that the living have no heirs and that the interest of the ancestor does not disqualify the heir apparent. *In re Sloan's Estate,* 50 Wash. 86, 90, 96 Pac. 684, 17 L. R. A. (N. S.) 960.

Accordingly in an action to quiet title against husband and wife who claim separate and distinct properties conveyed by the deceased to each of them by separate deeds of gift as the separate property of the grantee spouse in each instance, each spouse may testify in behalf of the other (although not in his own behalf), since the witness has no vested interest in the separate property of the other spouse. *Showalter v. Spangle,* 93 Wash. 326, 330, 160 Pac. 1042.

Dictum in *Meyer v. Campion,* 120 Wash. 457, 471, 207 Pac. 670,

that the wife is not a disinterested party as to the separate property of the husband, but the Court was there referring to the credibility rather than competency of her testimony. Trial court there followed the rule of the *Showalter* case, and Court evidently did not consider this erroneous

Husband is not a party in interest testifying in his own behalf, in action to recover separate property of the wife. *Griffin v. Lear,* 123 Wash. 191, 202, 212 Pac. 271.

C. Stockholder of Corporation.

In an action of unlawful detainer, H. W. Baker, president and one of the stockholders of defendant corporation, is a party in interest, whose testimony in behalf of the corporation as to an oral agreement with deceased lessor reducing the rent is inadmissible, where the conversation in question occurred prior to the organization of the defendant corporation at a time when the witness was carrying on the business in his individual capacity, since he at the time of the transaction was the real party in interest and was representing himself. *Gilmore v. H. W. Baker Co.,* 12 Wash. 468, 471, 41 Pac. 124.

In an action against executor of deceased payee to recover possession of a promissory note given by plaintiff individually to cover the excess of liabilities over assets at time of sale to the deceased of the assets of a banking corporation of which plaintiff was a stockholder and director, plaintiff is a party in interest whose testimony as to transactions and conversations with the deceased is inadmissible; but other stockholders and directors of the bank are not parties in interest where, although interested to see that the sale was made, they assumed no liability on the note and where no claim for contribution could arise against them in favor of the plaintiff. *Carr v. Jones,* 29 Wash. 78, 83, 69 Pac. 646.

A stockholder and officer of a corporation is a party in interest where the corporation is one of the interested parties (lessee), and his testimony in behalf of the corporation as to an agreement with deceased lessor reducing the rent is inadmissible. *Conlan v. Spokane Hardware Co.,* 117 Wash. 378, 381, 201 Pac. 26.

D. Assignor.

One cannot evade the statute or cease to be a party in interest by assigning his interest in the subject-matter, such as by assigning a

lease under which he was lessee, to a corporation which he had organized and of which he is president and a stockholder. *Gilmore v. H. W. Baker Co.,* 12 Wash. 468, 471, 41 Pac. 124.

However the original lessee who with consent of the lessor has assigned the lease to a corporation in which he has no interest or connection, is not a party in interest, and his testimony in behalf of the assignee is admissible. *Spotts v. Westlake Garage Co.,* 116 Wash. 255, 258, 199 Pac. 294.

An assignor who still retains an interest in the subject-matter assigned is a party in interest. *Shaw v. Lobe,* 58 Wash. 219, 221, 108 Pac. 450, 29 L. R. A. (N. S.) 333.

However an assignor for value who retains no interest in the subject-matter, so that he neither gains nor loses as a result of the suit, is not a party in interest and may testify as to his transactions with the deceased debtor. Dictum that if the witness were to be liable over to the assignee in case of nonrecovery, he would be a party in interest. *Olsen v. Kemoe,* 32 Wash. Dec. 216, 231 Pac. 778.

E. Effect of Disclaimer.

In an action against executors to have a real estate mortgage cancelled, a witness is a party in interest who had conveyed his interest in the land to a bank and retained a right to redeem upon payment of amount due to his grantee, so that the conveyance was in fact a mortgage, even though he later released his right to redeem. *Thorne v. Joy,* 15 Wash. 83, 85, 45 Pac. 642.

In an action to quiet title, a wife, not a party to the record, through whom both parties claim title, who files a sworn disclaimer of any interest in the property, is not a party in interest, and the defendant cannot disqualify her as a witness by an allegation in his cross complaint that she claims an interest therein. *Denny v. Schwabacher,* 54 Wash. 689, 694, 104 Pac. 137, 132 Am. St. Rep. 1140.

However, in an action to require the satisfaction of a mortgage and trust deed on the ground of payment of the note secured thereby, a witness who was made an additional defendant by defendant's cross complaint and who was one of the parties signing the note, mortgage and trust deed, and one of the appellants, is a party in interest even though his attorney in open court disclaims all interest in the case on his part. *Lee v. Northwest Trust and Savings Bank,* 128 Wash. 214, 215, 222 Pac. 489.

IX. Shall Not Be Admitted to Testify.

The statute excludes testimony under such circumstances by answers to written interrogatories, as well as oral testimony. *Moore v. Palmer,* 14 Wash. 134, 136, 44 Pac. 142.

As to depositions, see XIV, *infra.*

X. In His Own Behalf.

A party in interest may testify, but not in his own behalf. One not a party to the record is not testifying in his own behalf when he merely testifies to a state of affairs that may collaterally or remotely affect his interest. Where one's interest is not bound by the judgment in the particular proceeding in which he testifies, he cannot be said to be testifying in his own behalf. A widow, mortgagor, may testify in behalf of defendant, the mortgage foreclosure sale purchaser, that the property in question was her separate property rather than community property of herself and her deceased husband through whom the plaintiffs, his illegitimate children, claim title, since she was not testifying in her own behalf. *Sackman v. Thomas,* 24 Wash. 660, 672, 64 Pac. 819; *O'Toole v. Faulkner,* 34 Wash. 371, 375, 75 Pac. 975.

An affidavit of defendant stating the facts as to his execution and delivery to plaintiff's grantor of a lost deed is admissible in behalf of the plaintiff as a declaration against interest on the part of the defendant and is not testimony of the defendant in his own behalf. *Margett v. Wilson,* 85 Wash. 98, 103, 147 Pac. 628.

In an action to quiet title against husband and wife, each of whom claims as his separate property distinct properties through separate deeds of gift from the deceased, neither spouse is competent to testify in his own behalf, but each may testify in behalf of the other as to delivery of the deed by the deceased. *Showalter v. Spangle,* 93 Wash. 326, 330, 160 Pac. 1042; (also *Meyer v. Campion,* 120 Wash. 457, 471, 207 Pac. 670.)

XI. Subject Matter of Testimony Excluded; Transactions With the Deceased.

A. In General.

The statute does not disqualify a party in interest or party to the record as a witness, does not extend to every fact to which the deceased might testify if living, and excludes nothing except testimony concerning transactions had by the witness with or statement made

by the deceased or incompetent person. *Moore v. Palmer,* 14 Wash. 134, 136, 44 Pac. 142; *Kauffman v. Baillie,* 46 Wash. 248, 251, 89 Pac. 548; *O'Connor v. Slatter,* 48 Wash. 493, 496, 93 Pac. 1078; *Engstrom v. Peterson,* 107 Wash. 523, 527, 182 Pac. 623.

In an action to recover for personal services rendered for the deceased, plaintiff's testimony as to the time, place and nature of his work is admissible, as it relates solely to acts of the witness and does not relate to a transaction had by him with the deceased. For the same reason plaintiff's account book showing the services rendered is admissible. *Ah How v. Furth,* 13 Wash. 550, 553, 43 Pac. 639; *Sanborn v. Dentler,* 97 Wash. 149, 154, 166 Pac. 62; *Slavin v. Ackman,* 119 Wash. 48, 50, 204 Pac. 816.

Defendant's testimony as to a transaction between himself and one of the living plaintiffs is admissible although another one of the plaintiffs is deceased at time of trial, as there was no attempt to prove any transaction had with the deceased. *Rauh v. Scholl,* 19 Wash. 30, 31, 52 Pac. 332.

Testimony of the plaintiff in an action to recover his share of profits made in real estate investments by the deceased and himself, that he looked at certain lots when he was alone, stating the time when he saw them, their value, and that deeds were afterwards made for the property, is admissible, as nothing was said about transactions or conversations with the deceased. *Marvin v. Yates,* 26 Wash. 50, 57, 66 Pac. 131.

In an action to establish a one-third interest in real property of the deceased, plaintiff did not violate the statute where his testimony related only to transactions between himself and a third party, all of which occurred in the absence of the decedent, for the purpose of showing the services performed by the plaintiff in securing and purchasing the property. *Kauffman v. Baillie,* 46 Wash. 248, 251, 89 Pac. 548.

Testimony by the plaintiff as to whether or not defendant was present at the time the notes in suit were indorsed by the deceased is competent, since it is not testimony as to a transaction had by the plaintiff with the deceased. *O'Connor v. Slatter,* 48 Wash. 493, 496, 93 Pac. 1078.

In an action to enjoin removal of timber sold by the plaintiff to one, since deceased, who sold to defendant, plaintiff's testimony as to the transaction whereby he sold to the decedent, is incompetent. *Preston v. Hill-Wilson Shingle Co.,* 50 Wash. 377, 380, 97 Pac. 293.

Defendant's testimony as to transactions and conversations between himself and the grantee in a certain deed, through whom plaintiff claims title, are inadmissible, where the evidence, although conflicting, is sufficient to establish the death of said grantee. *Wash. Safe Deposit Co. v. Lietzow,* 59 Wash. 281, 283, 109 Pac. 1021.

In an action by administrator of deceased vendee against vendor for specific performance, defendant's testimony that the deceased had forfeited the contract is inadmissible. *Shorett v. Knudsen,* 74 Wash. 448, 450, 133 Pac. 1029.

Testimony by the husband and son of the deceased that certain property was a gift by them respectively to the deceased, without consideration, and that no community property entered into the transaction, so that the same was the separate property of the deceased, is competent, as it does not relate to a transaction with the deceased. *In re Cunningham's Estate,* 94 Wash. 191, 161 Pac. 1193.

Plaintiff's testimony that, acting as agent for the benefit of the deceased, he made certain payments to third parties with her moneys which he had collected, is competent, as it is not testimony as to any transaction had by him with the deceased. *Floe v. Anderson,* 124 Wash. 438, 439, 214 Pac. 827.

In an action on a promissory note, defense being an agreement with plaintiff's insane ward that the balance due thereon should be cancelled in consideration of defendant's services rendered, defendant may not testify that the ward hired him to work for her, or as to any agreement between them. *Blaser v. Meeker,* 125 Wash. 379, 382, 216 Pac. 1.

Payment of a debt or promissory note to the payee since deceased is a transaction had with the deceased, and testimony thereto is incompetent within the inhibition of the statute. *Goldsworthy v. Oliver,* 93 Wash. 67, 69, 160 Pac. 4; *Lee v. Northwest Tr. and S. Bank,* 128 Wash. 214, 215, 222 Pac. 489.

B. Execution, Delivery and Alteration of Deeds, Notes and Other Written Instruments.

In an action on a promissory note brought by the administratrix of the deceased payee, defendants may not testify that there was an alteration as to time of payment after the execution of the note, since this is testimony as to a transaction with the deceased. *Wolferman v. Bell,* 6 Wash. 84, 85, 32 Pac. 1017, 36 Am. St. Rep. 126.

In an action against executors, plaintiff's testimony that the de-

ceased put him in possession under an agreement for a deed and that the deed was delivered to him by the deceased but contained an erroneous description, is inadmissible, as it relates to a transaction had with the deceased; and this testimony should have been stricken even though the details of the transaction were brought out on cross-examination of the plaintiff, since the answers of the witness on direct examination, when explained, could not mean anything other than the transaction with the deceased. *Kline v. Stein,* 30 Wash. 189, 193, 70 Pac. 235.

Testimony by an endorser that the words "demand and notice waived" were not on a promissory note at the time of its endorsement to a person since deceased is incompetent as it relates to a transaction had by the endorser with the deceased. A maker or endorser may not testify after the death of the payee or endorser that the note was altered after execution and delivery or endorsement. *Bay View Brewing Company v. Grubb,* 31 Wash. 34, 37, 71 Pac. 553.

Testimony of the plaintiff is incompetent which is directed to the explanation of the conditions of a bond for a deed and other writings as between the witness and the deceased. *Reynolds v. Reynolds,* 42 Wash. 107, 112, 84 Pac. 579.

Testimony by the plaintiff as to whether or not defendant was present at the time the notes in suit were endorsed by the decedent is competent, since it is not testimony as to a transaction had by the plaintiff with the deceased. However, testimony by the plaintiff as to whether or not the notes had been changed since he received them from the deceased grantor is incompetent, since it is an indirect way of asking what their condition was when received from the deceased, and therefore relates to a transaction had by the witness with him. *O'Connor v. Slatter,* 48 Wash. 493, 496, 93 Pac. 1078.

Where the question is whether certain deeds executed by the deceased were delivered, the grantee may testify that he had the deeds in his possession very soon after the date thereof and thereafter continuously retained the same in his possession, as this is not testimony as to any transaction had by him with the deceased grantor. *Bardsley v. Truax,* 64 Wash. 400, 402, 116 Pac. 1075.

However, the grantee may not testify directly as to the delivery or receipt of such deed. *White v. Walker,* 84 Wash. 652, 147 Pac. 409; *Showalter v. Spangle,* 93 Wash. 326, 330, 160 Pac. 1042.

Testimony of the defendant identifying the signature of the deceased on receipts, which purported to have been given by deceased

to defendant, is competent, since such identification is not a transaction with the deceased or a statement made by him, and the receipt itself if in existence would be evidence of the fact that it was given. However, testimony that a certain receipt was given to defendant by the deceased or was in existence, but is lost and is not introduced as evidence, is incompetent, since the giving of the receipt was clearly a transaction with the deceased. *Goldsworthy v. Oliver,* 93 Wash. 67, 69, 160 Pac. 4.

Preparatory to proving the gift of certain stock from her husband, since deceased, a widow may testify that a written instrument evidencing the gift delivered to her by the husband contemporaneously with the delivery of the stock has since been lost, where this is offered not to prove the receipt or contents of the instrument but merely to show the loss thereof, thus laying the foundation for secondary evidence of its contents by another witness. *In re Bushnell's Estate,* 107 Wash. 331, 335, 182 Pac. 89.

Defendant's testimony that an interlineation adding the name of his wife after his name as grantee in a deed was not in the deed at the time of its execution and delivery, is competent, as it does not relate to "a transaction had by him with the deceased," since she was not present at the time the deed was executed, and if living could not have testified as to the condition of the deed at that time. *Engstrom v. Peterson,* 107 Wash. 523, 527, 182 Pac. 623.

Trial court permitted plaintiff to testify he had received a letter from his mother, since deceased, which was lost, but did not permit him to testify as to its contents; point not discussed. *Sturgis v. McElroy,* 113 Wash. 192, 195, 193 Pac. 719.

One may testify that she received a certain letter, introduced in evidence, from a person since deceased and that she performed the acts therein mentioned for the benefit of the sender of the letter by coming and taking care of her. *Slavin v. Ackman,* 119 Wash. 48, 50, 204 Pac. 816.

In an action against an executor to enforce claims against the estate, plaintiff contending that he had been induced by fraud of the deceased to endorse to him the notes given as the purchase price of mining claims in which they were interested, plaintiff may testify only to the surrounding circumstances, the fact that he endorsed the notes to the deceased, and the mutual execution of the writing entered into by them at that time. *Arneson v. Copeman,* 119 Wash. 659, 661, 206 Pac. 355.

In an action to obtain title to land deeded by plaintiff to the

deceased in consideration of his devising same to plaintiff, where decedent made such will at the time of the delivery of the deed but later revoked it and executed a will in defendants' favor, plaintiff may testify that the deceased executed the first will, that he saw the deeds by himself to the deceased in company with such will, and that the carbon copy introduced in evidence is a true copy of the first will executed by the deceased, since such testimony does not relate to a transaction had by him with the deceased. *Swingley v. Daniels,* 123 Wash. 409, 413, 212 Pac. 729.

In an action by executrix of deceased payee on a promissory note, one of the defendants may not testify that he signed, at a time when the payee was not present, as a mere accommodation maker at the request of the other maker, since the execution and delivery of the note is a transaction with the payee, and the payee if alive could have testified to whom he loaned the money, even though he could not have testified as to conversations between the two makers in his absence. *Denis v. Metzenbaum,* 124 Wash. 86, 213 Pac. 453.

Testimony as to an arrangement with a person since deceased whereby a deed executed by her was deposited in escrow to be delivered to the witness upon the death of the grantor is incompetent, as it relates to a transaction had by him with the deceased. *In re Miller's Estate,* 129 Wash. 211, 216, 224 Pac. 607.

C. Agreement With the Deceased.

An oral agreement with a person since deceased is a transaction, so that testimony as to such agreement is within the inhibition of the statute. *Gilmore v. H. W. Baker Co.,* 12 Wash. 468, 471, 41 Pac. 124; *Thorne v. Joy,* 15 Wash. 83, 86, 45 Pac. 642; *Cowen v. Culp,* 97 Wash. 480, 482, 166 Pac. 789; *Velikanje v. Dickman,* 98 Wash. 584, 593, 168 Pac. 465; *Andrews v. Andrews,* 116 Wash. 513, 517, 199 Pac. 981; *Conlan v. Spokane Hardware Co.,* 117 Wash. 378, 381, 201 Pac. 26; *Blaser v. Meeker,* 125 Wash. 379, 382, 216 Pac. 1; *In re Miller's Estate,* 129 Wash. 211, 216, 224 Pac. 607; *Perkins v. Allen,* 33 Wash. Dec. 297, 300, 234 Pac. 25.

D. Existence of Partnership With the Deceased.

Testimony to prove the existence of a partnership with the deceased is inadmissible, as it relates to a transaction had with the deceased. *In re Alfstad's Estate,* 27 Wash. 175, 187, 67 Pac. 593; *Kenney Presbyterian Home v. Kenney,* 45 Wash, 106, 110, 88 Pac. 108; *Chlopeck v. Chlopeck,* 47 Wash. 256, 258, 91 Pac. 966;

Shaw v. Lobe, 58 Wash. 219, 221, 108 Pac. 450, 29 L. R. A. (N. S.) 333; *Kelly v. Moss,* 120 Wash, 1, 2, 206 Pac. 941.

Likewise testimony as to transactions with the deceased to prove there was no partnership is inadmissible. *In re Krilich's Estate,* 122 Wash. 306, 311, 210 Pac. 788, 215 Pac. 9.

E. Transactions With the Representative of a Partnership or Corporation.

The statute excludes testimony as to transactions with a partner since deceased who was acting as the representative of his *partnership,* where the surviving partner has no personal knowledge of the transaction. Accordingly, an endorser of a promissory note to a partnership may not testify that there was an alteration by adding the words "demand and notice waived" subsequent to his endorsement and delivery of the note, after the death of the partner with whom the transaction was had, the surviving partner being ignorant thereof. *Bay View Brewing Co. v. Grubb,* 31 Wash. 34, 37, 71 Pac. 553.

However, the statute does not exclude testimony as to a transaction had with a *corporation* through its agent, officer and stockholder, since deceased. Dictum that

> "our statute applies, in its terms, only in the case of the death of a natural person who is a principal in the contract," and "makes no reference to corporations, or to agents of corporations, or even to agents of deceased natural persons."

Beaston v. Portland Trust & Savings Bank, 89 Wash. 627, 630, 155 Pac. 162, Ann. Cas. 1917-B 488; *Northern Bank and Trust Company v. Harmon,* 126 Wash. 25, 27, 217 Pac. 8.

F. Marriage With the Deceased.

In an action to quiet title, the issue being whether plaintiff and defendant's deceased mother were ever lawfully married, plaintiff may not testify that he and the deceased were never married to each other, since this relates to a transaction with the deceased. *Nelson v. Carlson,* 48 Wash. 651, 653, 94 Pac. 477.

Likewise plaintiff may not testify to the marriage of herself and the deceased. *Weatherall v. Weatherall,* 56 Wash. 344, 352, 105 Pac. 822.

G. Resulting Trusts.

A party in interest or to the record may not testify that he paid the purchase price of property, title of which was taken in the name of the deceased, so that the deceased held title as trustee of a resulting trust, nor may he testify in his own behalf to prove any fact tending to establish a resulting trust, as this relates to a transaction had by him with the deceased. *Spencer v. Terrel,* 17 Wash. 514, 518, 50 Pac. 468; *Smith v. Scott,* 51 Wash. 330, 331, 98 Pac. 763; *Weatherall v. Weatherall,* 56 Wash. 344, 352, 105 Pac. 822; *Brucker v. De Hart,* 106 Wash, 386, 390, 180 Pac. 397.

H. Account Books.

In an action to recover for services rendered for the deceased, an account book kept by plaintiff showing the time, amount and nature of his services, is admissible, as it relates solely to acts of the witness and not to a transaction had by him with the deceased. *Ah How v. Furth,* 13 Wash. 550, 553, 43 Pac. 639; *Sanborn v. Dentler,* 97 Wash. 149, 154, 166 Pac. 62.

Plaintiff may not, in proving that the deceased held certain property as trustee of a resulting trust, explain her method of bookkeeping to the effect that certain entries represented payments made by the witness to the deceased to be applied on the purchase price of the property. *Smith v. Scott,* 51 Wash. 330, 331, 98 Pac. 763.

In an action against executrix of deceased alleged partner for an accounting, the surviving partner may not explain the partnership books kept by him, as this relates to transactions had by him with the deceased. *Shaw v. Lobe,* 58 Wash. 219, 221, 108 Pac. 450, 29 L. R. A. (N. S.) 333.

In an action against an administrator to recover upon an account for money advanced and for services rendered as bookkeeper for the deceased, the journal kept by plaintiff for the deceased which, among other items apparently made in the usual course of business, at varying intervals, contained entries as to cash and labor charges in plaintiff's favor, some of which represented money advanced by plaintiff to the deceased, is admissible, since it is the book of the principal and admissible against him or his estate. *Robertson v. O'Neill,* 67 Wash. 121, 122, 120 Pac. 884.

In an action by executors against an alleged debtor of the deceased, defense being payment, defendant's account book containing no other account, showing entries of various alleged payments to the deceased over a period of three years, is inadmissible. The payments of these

amounts to the deceased were transactions had with him, and may not be proved by defendant's testimony either directly or by indirection through the means of an account book. The rule of *Ah How v. Furth* ought not to be further extended. *Goldsworthy v. Oliver,* 93 Wash. 67, 69, 160 Pac. 4.

In an action on a promissory note brought by the executor of the deceased payee against the executrix of the deceased maker, the issue being as to payment, the ledger account kept by the deceased payee containing the original entries of this transaction, is admissible, in view of the testimony of the plaintiff executor, who has no further interest in the action (proviso to the proviso), that the account had been shown to the maker of the note before his death, who then admitted it was correct. *Burnham v. Rowley,* 111 Wash. 656, 658, 191 Pac. 811.

In an action by executrix on a promissory note and for money received, defendant's testimony identifying the books of account pertaining to the mercantile business conducted by defendant and the deceased as partners, and stating that said books were kept by defendant and his wife, is competent, and the books themselves are admissible. *McDonald v. McDonald,* 119 Wash. 396, 403, 206 Pac. 23.

XII. Subject Matter of Testimony Excluded: Statements Made by the Deceased.

In an action by administratrix to recover money paid by the deceased upon a settlement, objection was properly sustained to question propounded to defendant, "State what transpired at the time of the settlement and all you remember about it," since the question was general and called for everything that transpired at that time and included statements made by the deceased. *Moylan v. Moylan,* 49 Wash. 341, 344, 95 Pac. 271.

In an action to quiet title, the question being whether a deed in form was in fact a deed absolute or a mortgage, defendant may not testify as to statements made to her by her deceased husband to the effect that it was a mortgage. The rule of *res gestae* does not apply to the extent of overcoming the statute and rendering evidence competent which is incompetent under the statute. *Dempsey v. Dempsey,* 61 Wash. 632, 635, 112 Pac. 755.

In an action on an open account against an administrator, testimony of the plaintiff that the deceased had checked over his account

and said that he approved it and that it was correct, is inadmissible. *Robertson v. O'Neill,* 67 Wash. 121, 123, 120 Pac. 884.

The statute excludes testimony not only as to statements made by the deceased to the interested witness but also testimony as to statements made by him *to a third party* in the presence of the witness, "under the doctrine of necessary implication." *Nicholson v. Kilbury,* 80 Wash. 500, 141 Pac. 1043.

Testimony that in entering into an agreement the witness relied upon the alleged fraudulent statements and representations of the deceased is admissible, where the witness does not herself testify what the statements were. *Normile v. Denison,* 116 Wash. 452, 456, 199 Pac. 995; *O'Connor v. Slatter,* 46 Wash. 308, 89 Pac. 885.

Testimony as to statements made by the decedent was also held inadmissible in *Kalinowski v. McNeny,* 68 Wash. 681, 682, 123 Pac. 1074, and *Wilson v. Joseph,* 101 Wash. 614, 616, 172 Pac. 745.

Testimony by an interested party as to an oral agreement with the deceased is inadmissible; see cases cited, XI. C., *supra.*

XIII. The Proviso to the Proviso.

The defendant, widow of the deceased, may not testify as to transactions with or statements by her deceased husband, as she does not come within the proviso to the proviso, since, although defending in a fiduciary capacity as the guardian of her minor child, under fourteen, she has a further interest in the action, inasmuch as she is claiming a one-half interest in the alleged community property. *Brown v. Davis,* 98 Wash. 442, 445, 167 Pac. 1095.

An executor who claims property adversely to the estate as his individual property by deed from the deceased does not come within the proviso to the proviso, since he has a personal interest in the action. *In re Miller's Estate,* 129 Wash. 211, 216, 224 Pac. 607.

Where the plaintiff is an executor of a decedent's estate and has no personal interest in the action, his testimony as to statements made to him by the defendant's testator, is admissible, under the proviso to the proviso. (Court does not discuss). *Burnham v. Rowley,* 111 Wash. 656, 658, 191 Pac. 811.

In a probate proceeding, the mother by adoption of an adopted grandchild of the deceased not mentioned in the will, who petitions as guardian in behalf of the infant that he be awarded his share of the estate as though the deceased had died intestate, and who has no further interest in the action, "was not an incompetent witness," under the statute, and was properly permitted to testify that the tes-

tator knew and approved of the adoption of the child by his son. *Chaffee v. Morris* (decided May 13, 1925), 34 Wash. Dec. 260, 264.

XIV. The Rule as to Depositions.

Where one of the defendants died and his administrators were substituted as parties, subsequent to the taking of the deposition of one of the plaintiffs but before trial, the plaintiff's deposition is admissible, since the rule of the statute is to be applied as of the time of testifying, that is, the time of taking the deposition (at which time all of the adverse parties were living), rather than the time of trial and its introduction in court. If the witness and his testimony are competent at the time the deposition is taken, the prohibition of the statute does not apply although after the taking of the deposition and before trial one of the adverse parties dies. *Neis v. Farquharson,* 9 Wash. 508, 515, 37 Pac. 697; *Beaston v. Portland Trust & Savings Bank,* 89 Wash. 627, 630, 155 Pac. 162, Ann. Cas. 1917-B 488.

XV. Relation to Other Rules of Evidence.

The mere fact that otherwise the testimony would be admissible as part of the *res gestae* does not cause it to be admissible if it is excluded by the proviso of this statute. *Dempsey v. Dempsey,* 61 Wash. 632, 635, 112 Pac. 755.

The statute does not change the general rule that self-serving declarations made out of the presence of the other party are inadmissible. The deceased if living could not testify to self-serving declarations made to third parties, nor may his representatives prove such declarations even though they are not excluded by this statute. *O'Connor v. Slatter,* 46 Wash. 308, 89 Pac. 885; *Goldsworthy v. Oliver,* 93 Wash. 67, 69, 160 Pac. 4.

XVI. Specific and Timely Objection Should Be Made.

Objection under this section should be specifically on the grounds therein set forth and not merely a general objection that the testimony is incompetent, irrelevant and immaterial. *Sackman v. Thomas,* 24 Wash. 660, 686, 64 Pac. 819.

In an action to quiet title, where testimony was admitted on behalf of the plaintiff without objection, the witness was rigidly cross-examined on the subject-matter of his testimony and was not examined as to his personal interest, and several days later a motion was made to strike his testimony under this statute on the ground that the witness had conveyed to plaintiff's predecessor in title by warranty deed, the motion to strike was properly denied inasmuch as the

question was not raised timely and the witness might have had some explanation of his apparent interest by reason of his warranty. *Newman v. Buzard,* 24 Wash. 225, 228, 64 Pac. 139.

In an action tried *de novo* on appeal, the Supreme Court will disregard testimony incompetent under the statute although not objected to in the lower court. *Wolferman v. Bell,* 6 Wash. 84, 85, 32 Pac. 1017, 36 Am. St. Rep. 126.

In cases tried *de novo* on appeal, the Supreme Court will not order a reversal and new trial for error in the admission of evidence under this statute, but will merely disregard the evidence erroneously admitted. *Johnson v. Clark,* 120 Wash. 25, 29, 206 Pac. 914.

It may be noted that the court commented favorably on the fact that counsel cautioned the witness not to testify as to any transactions had by him with or statements made by the deceased, in *Marvin v. Yates,* 26 Wash. 50, 57, 66 Pac. 131, and *Kauffman v. Baillie,* 46 Wash. 248, 251, 89 Pac. 548.

XVII. Waiver of Right to Object.

In an action on a promissory note against the administratrix of the deceased guarantor, the administratrix by testifying fully as to the transaction does not in any way waive her right to object to testimony by plaintiffs as to transactions had with her deceased husband. *O'Connor v. Slatter,* 48 Wash. 493, 495, 93 Pac. 1078.

In an action on an open account against an administrator to recover for money advanced and services rendered to the deceased, error in the admission of plaintiff's testimony that the deceased checked over his account and said it was correct, is waived where after reserving his exception to the evidence, defendant cross-examined the plaintiff touching a number of items in the account, had him identify the checks of the deceased issued to the plaintiff, and had him admit that he received and cashed them. Also where defendant later called plaintiff as a witness and had him identify the signatures to certain exhibits, including checks drawn in plaintiff's favor by the deceased, and the court permitted plaintiff to explain why the checks were drawn in his favor and to state that he gave the money which they represented to the deceased, the defendant has waived his right to object thereto. The law will not permit the representative of a deceased person to use the adverse party to the extent that it might aid him and then claim the benefit of the statute when the adverse party seeks to qualify or explain his testimony. A like rule applies where the cross-examination is extended beyond the scope of what the witness would have been permitted to testify in chief upon direct examination. "He who invokes the protection

of the statute must himself respect it." *Robertson v. O'Neill,* 67 Wash. 121, 123, 120 Pac. 884.

In an action by an administrator to recover property of the estate, the administrator does not waive his right to object to incompetent testimony of the defendant by previously bringing an inquisitorial proceeding under Rem. Comp. Stat., Sec. 1472 (Laws '17, p. 670, chap. 156) before the probate court to ascertain the property left by the deceased and examining the witness at that proceeding. Dictum that if the administrator had offered in evidence the answers given by the witness at the previous hearing, she could have testified to any fact therein referred to and possibly to the entire transaction. *Percy v. Miller,* 115 Wash. 440, 443, 197 Pac. 638.

In an action by administrators to recover property of the estate, where plaintiffs called a court reporter and introduced part of defendant's testimony at a former trial in the probate proceeding, to prove contradictory statements and admissions, defendant on cross-examination may introduce the complete transcript of his testimony at the former trial, and the plaintiffs have waived their right to object thereto. *Levy v. Simon,* 119 Wash. 179, 186, 205 Pac. 426.

In an action against an administrator to establish a claim against the estate, the court properly overruled an objection to testimony of the plaintiff that part of the money in a payment to him by the deceased was a mere repayment of his own money, where this testimony was brought out on cross-examination of plaintiff by defendant's attorney, since a representative may not examine the opposing party on matters to which he would otherwise be incompetent to testify and accept his testimony insofar as it aids him and reject it insofar as it is adverse to him. *Johnson v. Clark,* 120 Wash. 25, 29, 206 Pac. 914.

In an action by an administratrix against the attorney of the deceased to establish a trust in real property and for an accounting, where defendant is called as a witness for plaintiff but is not examined as to any transaction had by him with, or any statement made to him by the deceased, the plaintiff does not waive the benefit of the statute, and on cross-examination the defendant may not testify as to transactions and conversations with the deceased. (Judges Fullerton and Mitchell dissenting). *Conner v. Hodgdon,* 120 Wash. 426, 433, 207 Pac. 675.

Where defendant executor calls plaintiff as a witness and has him testify that he had collected certain funds as agent for the deceased, plaintiff on cross-examination may testify that he made certain payments with said funds to third parties as agent for the benefit of the

deceased, since defendant has waived the right to object thereto. *Floe v. Anderson,* 124 Wash. 438, 440, 214 Pac. 827.

XVIII. Conclusion.

To summarize briefly, it is evident that a particular case comes within the proviso to the proviso, and therefore the evidence is admissible, where the two following essential requirements concur:

1. The witness must be a party of record, and must be suing or defending in a representative or fiduciary capacity; and

2. He must have no other or further interest in the action.

Unless a particular case comes within the proviso to the proviso, it comes within the proviso, and therefore the testimony is inadmissible, when, and only when, the three following essential requirements concur:

1. The *party adverse* to the witness, or adverse to the party calling him, and for whom he testifies, must be suing or defending as executor, administrator, or in one of the other representative capacities enumerated in the statute.

2. The *witness* must be *either a party in interest or a party to the record, and* also he must be testifying *in his own behalf.*

3. The *subject matter of the testimony* objected to must be *either* (a) as to a *transaction* had by the witness with the deceased or incompetent person, *or* (b) as to a *statement* made to the witness or to another in his presence by such deceased or insane person or minor under fourteen.

Where these three essentials are all present, and the case does not come within the proviso to the proviso, the proviso applies and renders the testimony inadmissible.

This may be expressed in the form of three questions or tests to be applied in each case:

1. Is the party adverse to the witness (or to the party calling him) suing or defending in one of the enumerated capacities?

2. Is the witness a party in interest or a party to the record, and testifying in his own behalf?

3. Is he testifying as to a transaction had by him with the deceased or incompetent person, or as to a statement made either to him or in his presence by such person?

If all of these questions are answered in the affirmative, the case comes within the proviso and the testimony is inadmissible. If any one or more of the questions is answered in the negative the testimony is admissible. [14]

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